

2009

State of Utah v. Lucia Arnold & Vanessa Arnold : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff / Appellee, vs. LUCIA ARNOLD & VANESSA ARNOLD, Defendant / Appellant.	Case No: 20090854-CA
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BRIEF OF APPELLANT

APPEAL FROM THE FOURTH DISTRICT COURT, UTAH COUNTY, STATE OF
UTAH, FROM CONVICTIONS OF RETAIL THEFT, THIRD DEGREE FELONIES,
BEFORE THE HONORABLE GARY D. STOTT AND DAVID N. MORTENSEN

MARK SHURTLEFF Utah Attorney General Appeals Division 160 East 300 South, Sixth Floor P.O. Box 140854 Salt Lake City, UT 84114 Counsel for Appellee	MARGARET P. LINDSAY (6766) MATTHEW MORRISE (13082) Utah County Public Defender Association P. O. Box 1058 Spanish Fork, Utah 84660 Telephone: (801) 318-3194 Counsel for Appellant	FILED UTAH APPELLATE COURTS
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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 20090854-CA
vs.	:	
	:	
LUCIA ARNOLD & VANESSA	:	
ARNOLD,	:	
	:	
Defendant/Appellant.	:	
	:	

BRIEF OF APPELLANTS

JURISDICTION OF THE UTAH COURT OF APPEALS

This Court has appellate jurisdiction in this matter pursuant to the provisions of Utah Code Annotated § 78-4-103(2)(e).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether the Appellants were denied the assistance of competent trial counsel as guaranteed by the Sixth Amendment when counsel failed to recognize that the State had opened the door to the admission of important evidence that the trial court had previously excluded pursuant to Rules 402 and 403 of the Utah Rules of Evidence. This Court reviews an ineffectiveness claim, raised for the first time on appeal, as a question of law.

State v. Cox, 2007 UT App 317, ¶ 13, 169 P.3d 806 (quoting *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162). “To prevail on an ineffective assistance of counsel claim, ‘[D]efendant must demonstrate that counsel's performance was deficient, in that it fell below an objective standard of reasonable professional judgment’ and that ‘counsel's deficient performance was prejudicial-i.e., that it affected the outcome of the case.’” *State v. Cox*, 2007 UT App 317 at ¶ 20 (quoting *State v. Litherland*, 2000 UT 76, ¶ 19, 12 P.3d 92 (citation omitted)).

CONTROLLING STATUTORY PROVISIONS

Rule 402, Utah Rules of Evidence

All relevant evidence is admissible. except as otherwise provided by the Constitution of the United States or the Constitution of the state of Utah, statute, or by these rules, or by other rules applicable in courts of this state. Evidence which is not relevant is not admissible.

Rule 403, Utah Rules of Evidence

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

A. Nature of the Case

Lucia Gomez Arnold and Vanessa Lucia Arnold appeal from the judgment and sentence of the Honorable Gary D. Stott and David M. Moretensen, Fourth District Court, after their convictions for retail theft, a third degree felony.

B. Trial Court Proceedings and Disposition

Lucia Gomez Arnold and Vanessa Lucia Arnold were charged by criminal information filed on May 15, 2008 in Fourth District Court with: Count 1 – Retail Theft, a third degree felony, in violation of Utah Code Ann. §§ 76-6-602 and 76-6-412; Count 2 – Retail Theft, a class A misdemeanor, in violation of Utah Code Ann. §§ 76-6-602 and 76-6-412. (R. 6-5).¹ The information was amended on June 19, 2008, to strike Count 2. (R. 18-17; 17-16).

At a preliminary hearing on August 21, 2008, Appellants established that the State's witnesses, former Deputy Sheriff Kris Hendricksen and Officer Douglas Stradling, were acquainted with former Deputy Sheriff Skip Curtis, and alleged that these witnesses had falsified evidence against Appellants in retaliation for a personal injury lawsuit filed by Appellant Vanessa Arnold against Skip Curtis. (Transcript of

¹ The two cases were consolidated for purposes of appeal, however, each defendant has her own pleadings file. When the index numbers in each file differ, the first number will refer to Lucia's file and the second to Vanessa's. The transcript citations are the same for both appellants.

Preliminary Hearing, 21:7-11; 22:5-17; 70:17-25; 71:1-13). The trial court ruled that evidence concerning the lawsuit against Skip Curtis was irrelevant for purposes of the preliminary hearing, and the charges were bound over for trial. (Transcript of Preliminary Hearing, 22:18-25; 23:1-6; R. 29; 2).

On May 22, 2009, four days before trial, the State filed a motion *in limine* to exclude all evidence of Vanessa Arnold's lawsuit against Skip Curtis under Utah R. Evid. 402 and 403. (R. 129-121; 128-120). Appellants did not make a written response.

The trial court heard argument on the motion on the morning of the first day of trial, May 26, 2009. (R. 135; 134). Appellants proffered testimony that after apprehending Appellants, Hendricksen and Stradling verbally identified Appellant Vanessa Arnold as "the individual that sued Skip Curtis." (Transcript of Jury Trial, 5:3-4). Appellants also proffered that, while transporting Appellant Vanessa Arnold to the Utah County Jail, Stradling drove to a location where Skip Curtis was waiting. (Transcript of Jury Trial, 5:5-17). Skip Curtis opened the door of Stradling's patrol car, put a gun to Appellant Vanessa Arnold's head, and instructed her to terminate the lawsuit against him. (Transcript of Jury Trial, 5:9-17).

Appellants argued that this evidence, together with evidence establishing the lawsuit filed by Appellant Vanessa Arnold against Skip Curtis, was relevant to the issue of credibility of the State's witnesses. (Transcript of Jury Trial, 6:7-25; 7.) Nevertheless, the trial court granted the State's motion to exclude the evidence under Utah R. Evid. 402

and 403, and ordered that Appellants were not, in any way, to refer to Skip Curtis, the lawsuit against Skip Curtis, or the incident alleged to have taken place as Appellant Vanessa Arnold was being transported to the Utah County jail. (Transcript of Jury Trial, 10:18-25; 11-13; 14:1-4.)

At trial, Appellants complied with the Court's order, and limited their defense to an allegation of a random conspiracy to falsify evidence against Appellants. (Transcript of Jury Trial, 281-334.) During cross-examination of Appellants, the State focused on the apparent lack of a motive for the conspiracy, posing questions such as "Mr. Hendrickson (sic), he really wants to hurt you, doesn't he?" and "Officer Stradling of the Provo Police Department is trying to hurt you, isn't he?" (Transcript of Jury Trial, 300:17-25; 301-304; 330:25; 331-333; 334:1-4.) Despite these questions, Appellants' trial counsel failed to seek release from the trial court's order excluding evidence of the Skip Curtis lawsuit.

The trial jury found Appellants guilty of retail theft. (R. 171; 170, 155).

On June 9, 2009, Appellants filed a motion to arrest judgment, alleging that the trial court erred in excluding evidence relating to the Skip Curtis lawsuit, and that Appellants were prejudiced because the trial court's order prevented them from truthfully answering the State's cross-examination questions regarding a motive for the alleged conspiracy against Appellants. (R. 175-174; 210-209). The State responded on July 9, 2009. (R. 195-185; 186-177). The trial court ruled that the State's cross-examination

had opened the door to evidence relating to Skip Curtis, but that any claim of prejudice had been waived because Appellants' trial counsel failed to raise the issue or seek release from the court's order at trial. (R. 197; 193).

On September 10, 2009, Appellants were sentenced to probation and were ordered to spend 30 days in the Utah County Jail with GPS monitoring, and to pay a fine. (R. 224-222; 215-13).

On October 2, 2009, Appellants filed notices of appeal with the Fourth District Court. (R. 234; 220). This Court subsequently consolidated their cases into a single appeal. (R. 238; 224).

STATEMENT OF RELEVANT FACTS

1. On May 7, 2008, Scott McDermeit, a security officer for the Dillard's store at the Provo Towne Center mall in Utah County, observed Appellants Lucia and Vanessa Arnold shopping at Dillard's via a security surveillance camera. (Transcript of Jury Trial, 99:3-25; 100:1-16.)
2. McDermeit observed Appellants enter the dressing rooms with a large number of items in their arms, and carrying large plastic bags. (Transcript of Jury Trial, 100:13-16; 101:23-24; 103:13-16.) McDermeit testified that, over a period of approximately an hour and fifteen minutes, he observed Appellant Lucia Arnold exit the dressing room two or three times, return a few items to the racks, and re-enter the dressing room with a large

number of additional items. (Transcript of Jury Trial, 103:16-25; 14:1-20.)

3. McDermeit testified that when Appellants finally exited the dressing rooms together, their bags appeared to be full, and they did not return some of the items that they had carried into the dressing rooms to the racks. (Transcript of Jury Trial, 105:14-17.) McDermeit asked another Dillard's security officer, Kris Hendricksen, to stop the Arnolds. (Transcript of Jury Trial, 104:21-25; 105; 106:1.)
4. Hendricksen, accompanied by Dillard's manager Arloha Sutherland, confronted Appellants, and asked them to accompany him to the manager's office. (Transcript of Jury Trial, 167:10-13.) Once inside the manager's office, Hendricksen accused Appellants of shoplifting. (Transcript of Jury Trial, 167:18-20.) Hendricksen and Sutherland testified that Appellants' bags contained shoeboxes with string tied around them, and inside the shoeboxes were multiple pieces of tightly rolled Dillard's clothing. (Transcript of Jury Trial, 168:8-17; 200:13-25; 201:1-4.) Hendricksen testified that he did not find any receipts or proof of purchase labels for the clothing. (Transcript of Jury Trial, 169:7-22.)
5. Appellants testified that they did not conceal clothing inside of their shoeboxes, but that the shoeboxes contained shoes that were to be returned to other stores. (Transcript of Jury Trial, 282:8-14; 293:19-23; 320:9-12; 323:19-25; 324:1-4.) They testified that when they were taken to the manager's office, Hendricksen dumped some clothing out onto the floor, and Hendricksen and Sutherland produced price tags from a

desk drawer and added them up. (Transcript of Jury Trial, 291:24-25; 292:1; 293:24-25; 294:1-8; 324:9-25.)

6. Sutherland testified that the total value of the items found inside Appellants' shoeboxes was \$1,049. (Transcript of Jury Trial, 208:15.)
7. Hendricksen advised McDermeit that he had recovered stolen merchandise from Appellants. (Transcript of Jury Trial, 127:21-25.) McDermeit then called the Provo Police Department. (Transcript of Jury Trial, 127:21-25.)
8. Officer Douglas Stradling responded from the Provo Police Department. (Transcript of Jury Trial, 233:10-24.) Stradling testified that Appellants were speaking Spanish, which he did not understand, and so he moved Appellant Vanessa Arnold into an adjacent office. (Transcript of Jury Trial, 237:7-25; 238, 239:1-14.) Stradling testified that Appellant Vanessa Arnold resisted, and so he took her to the ground and handcuffed her. (Transcript of Jury Trial, 238:3-25; 239:1-14.) Stradling also handcuffed Appellant Lucia Arnold. (Transcript of Jury Trial, 240:7-18.) Stradling searched Appellant Vanessa Arnold, and found car keys in her pocket. (Transcript of Jury Trial, 240:25; 241:1-8.)
9. Appellants testified that Hendricksen and Stradling verbally and physically abused them. (Transcript of Jury Trial, 294:14-25; 295-298; 299:1-12; 325; 326:1-17.)
10. Stradling radioed dispatch and asked for a Spanish speaking officer. (Transcript of Jury Trial, 239:24-25.) Officer Brad Partridge responded. (Transcript of Jury Trial,

263:6-18.) Stradling gave the car keys to Officer Partridge, and asked him to find Appellants' car in the parking lot and look through the car windows for other evidence. (Transcript of Jury Trial, 243:5-8.)

11. Partridge testified that he and McDermeit located Appellants' car and observed clothing rolled up in the back seat. (Transcript of Jury Trial, 264:13-25; 265:1-13.) Stradling then went out to the car and seized the clothing. (Transcript of Jury Trial, 243:17-25; 244:1.) Stradling checked with Dillard's employees, but the clothing in the car did not belong to Dillard's. (Transcript of Jury Trial, 244:8-14.)
12. Stradling determined that there was probable cause to support retail theft charges, and took Appellants into custody. (Transcript of Jury Trial, 236:5-6; 239:6-14; 240:7-21.) Officer Stradling transported Appellant Vanessa Arnold to the Utah County jail, and Officer Partridge transported Appellant Lucia Arnold to the Utah County jail. (Transcript of Jury Trial, 244:19-25, 245:1-5.)

SUMMARY OF ARGUMENT

This Court should vacate Appellants' convictions for retail theft and remand for a new trial because Appellants' trial counsel was ineffective. Trial counsel is ineffective when trial counsel makes an omission, where 1) there is no tactical advantage to be gained by the omission; and 2) absent the omission, there was a reasonable probability of a more favorable result. *See State v. Cox*, 2007 UT App 317, 169 P.3d 806.

In this case, trial counsel failed to seek release from the trial court's order excluding evidence of Vanessa Arnold's lawsuit against Skip Curtis after the prosecutor opened the door to the evidence. There was no tactical advantage justifying this omission, as the evidence was necessary to provide a motive for the conspiracy alleged by Appellants. Furthermore, there was a reasonable probability of a more favorable result if the evidence had been omitted, since it provided a motive for what otherwise appeared to be an allegation of a random conspiracy to frame Appellants for retail theft.

ARGUMENT

POINT I

APPELLANTS' TRIAL COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO SEEK RELEASE FROM THE TRIAL COURT'S ORDER EXCLUDING EVIDENCE CRITICAL TO THE APPELLANTS' THEORY OF THE CASE AFTER THE STATE HAD OPENED THE DOOR TO ITS ADMISSION

This Court should vacate Appellants' convictions for retail theft and remand for a new trial because Appellants' trial counsel was ineffective. Trial counsel is ineffective where 1) trial counsel's performance is deficient, in that it falls below a reasonable standard of professional judgment; and 2) trial counsel's deficient performance is prejudicial, in that it affects the outcome of the case. *State v. Cox*, 169 P.3d 806, 811-813 (Utah App. 2007) (citing *State v. Litherland*, 12 P.3d 92, 99 (Utah 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984))); *State v. Pecht*, 2002 UT 41, 48 P.3d 931, 940.

A. Trial Counsel's Performance Fell Below a Reasonable Standard of Professional Judgment

Appellants' trial counsel's performance fell below a reasonable standard of professional judgment because there was no tactical advantage to be gained by trial counsel's failure to seek release from the Court's order excluding evidence relating to Skip Curtis. Trial counsel's performance falls below a reasonable standard of professional judgment when trial counsel makes an omission, and there is no tactical advantage to be gained by the omission. *State v. Cox*, 2007 UT App 317, 169 P.3d 806.

In *Cox*, the defendant was convicted of the aggravated sexual abuse of his stepchild. *Id.* at ¶ 1. The sole aggravating factor alleged by the State was that the defendant occupied a position of special trust as the victim's stepparent. *Id.* at ¶ 22. Although the statute in effect at the time of the alleged abuse specifically excluded the role of stepparent as a position of special trust, the trial judge erroneously instructed the jury that the defendant occupied a position of special trust as the victim's stepparent. *Id.* at ¶ 16. The defendant's trial counsel failed to object to the erroneous instruction. *Id.* at ¶ 19.

This Court held that there was no tactical advantage to be gained by trial counsel's failure to object to the erroneous instruction, and thus trial counsel's performance fell below a reasonable standard of professional judgment. *Id.* at ¶¶ 21-22. The Court noted that the State had alleged only one aggravating factor, and if trial counsel had objected to the jury instruction defining a position of special trust as a stepparent, the State would

have been forced to go back to the beginning of the prosecution. *Id.* at ¶ 22; *see also* *State v. Marble*, 2007 UT App 82, ¶¶ 20-21, 157 P.3d 371 (trial counsel's stipulation to a position of special trust as an aggravating factor not ineffective assistance where the State could have relied on a second alleged aggravating factor, and trial counsel's stipulation limited the jury's exposure to potentially damaging evidence).

In this case, there was no tactical advantage to be gained by trial counsel's failure to seek release from the trial court's order after the State had opened the door to evidence of the Skip Curtis lawsuit. Trial counsel's strategy was to attack the credibility of the State's witnesses, and to allege a conspiracy to retaliate against Appellants for the personal injury lawsuit filed by Appellant Vanessa Arnold against Skip Curtis.

Trial counsel cross-examined the State's witnesses at the preliminary hearing concerning a conspiracy to retaliate against Appellants for the Skip Curtis lawsuit. (Transcript of Preliminary Hearing, 21-22; 23:1-10; 70:17-25; 71:1-13.) Trial counsel argued against the State's motion *in limine* to exclude evidence of the Skip Curtis lawsuit and to exclude evidence of the incident alleged to have taken place as Appellant Vanessa Arnold was being transported to the Utah County jail. (Transcript of Jury Trial, 4:19-25; 5-7.)

At trial, trial counsel alleged a conspiracy against Appellants in his opening statement. (Transcript of Jury Trial, 87:3-21.) Trial counsel called both Appellants as witnesses, and they testified that they believed there was a conspiracy to frame them for

shoplifting. (Transcript of Jury Trial, 291:17-25; 292-299; 300:1-11; 322:20-25; 322-327; 328:1-2.) Trial counsel focused on the conspiracy in his closing argument. (Transcript of Jury Trial, 370:12-25; 371-375; 376:1-5.) After losing at trial, trial counsel submitted two motions to arrest judgment based on the trial court's exclusion of evidence relating to the Appellant Vanessa Arnold's lawsuit against Skip Curtis. (R. 181-174; 218-217.)

Thus, trial counsel's failure to seek admission of evidence relating to Appellant Vanessa Arnold's lawsuit against Skip Curtis after the State had opened the door to it was a serious error, and was not the kind of "sound trial strategy" that trial counsel has the latitude to implement on behalf of his clients. *See Strickland v. Washington*, 466 U.S. 668, 689 (1984). Therefore, trial counsel's performance fell below a reasonable standard of professional judgment.²

B. Trial Counsel's Deficient Performance Affected the Outcome of the Case Because It Prevented Appellants from Presenting Evidence of the Motive for the Alleged Conspiracy Against Them.

Appellants' trial counsel's performance was prejudicial, because a reasonable probability exists that the jury would have acquitted Appellants, had the jury been presented with evidence of a motive for the alleged conspiracy to falsify evidence against Appellants. Trial counsel's deficient performance is prejudicial if a reasonable probability exists that, but for the deficient performance, a more favorable outcome

² We note that Appellants' trial counsel, S. Austin Johnson, was publicly reprimanded four times in the November issue of the *Utah Bar Journal*, Vol. 23 No. 6, 57-58.

would have been obtained at trial. *State v. Greuber*, 2007 UT 50, 165 P.3d 1185; *State v. Clark*, 2004 UT 25, 89 P.3d 162.

In this case, there is a reasonable probability that Appellants would have been able to obtain a more favorable outcome at trial if they would have been able to present evidence relating to Appellant Vanessa Arnold's lawsuit against Skip Curtis. In light of the trial court's order excluding this evidence, Appellants' trial defense was limited to a bare allegation that Kris Hendricksen, Officer Stradling, and others had conspired to falsify evidence against Appellants for no reason.

Appellants inability to produce evidence of a motive for this conspiracy considerably weakened the credibility of Appellants' testimony and arguments. The State took advantage of this weakness, focusing heavily on the apparent lack of a motive for the alleged conspiracy in both its cross-examination of Appellants and its closing argument. (Transcript of Jury Trial, 300:17-25; 301-304; 330:25; 331-333; 334:1-4; 357:13-15; 359:5-14; 360:21-25; 361:1-10; 379:6-9). In fact, it was the State's focus on a lack of a motive for the conspiracy that led the trial court to conclude that the State had opened the door evidence relating to Appellant Vanessa Arnold's lawsuit against Skip Curtis. (R. 197.)

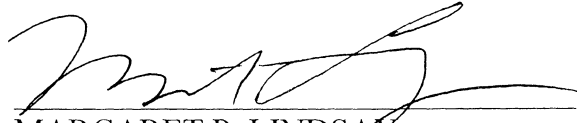
Considering the totality of the evidence before the jury, the absence of evidence concerning Appellant Vanessa Arnold's lawsuit against Skip Curtis lawsuit had "a pervasive effect on the inferences to be drawn from the evidence, altering the entire

evidentiary picture.” *State v. Hales*, 2007 UT 14, ¶ 86, 152 P.3d 321 (quoting *Strickland*, 466 U.S. at 694). That effect is sufficient to undermine confidence in the outcome of the trial. *See Taylor v. State*, 2007 UT 12, ¶ 60, 156 P.3d 739 (quoting *Strickland*, 466 U.S. at 694). Thus, trial counsel’s failure to seek release from the trial court’s order excluding evidence of Appellant Vanessa Arnold’s lawsuit against Skip Curtis lawsuit was prejudicial, and trial counsel rendered ineffective assistance.

CONCLUSION AND PRECISE RELIEF SOUGHT

Lucia and Vanessa Arnold ask that this Court reverse their convictions for retail theft because they were denied their constitutional right to competent counsel.

DATED this 8th day of November, 2010.


MARGARET P. LINDSAY
MATTHEW R. MORRISE
Counsel for Appellant

CERTIFICATE OF MAILING

I hereby certify that I delivered two (2) true and correct copies of the foregoing Brief of Appellant to the Appeals Division, Utah Attorney General, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, UT 84114, this 8th day of November, 2010.

